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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1956

No. [redacted]

BRYAN E. FORD, Petitioner

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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August 31, 1956

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Petitioner, Bryan E. Ford, prays that a writ of certiorari be issued to review a judgment of the United States Court of Appeals for the Second Circuit, entered on August 6, 1956.

OPINIONS BELOW

The District Court wrote no opinion. The opinion of the Court of Appeals (copy attached hereto) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on August 6, 1956. Jurisdiction of this Court is invoked under 28 U. S. C. section 1254 (1).

QUESTIONS PRESENTED

(1). Whether the petitioner, a police officer, could properly be convicted of income tax evasion on the net worth theory, in the use of which the government attributed to him the assets and expenditures of his family, without a showing that petitioner had a likely source of income from which net worth increases might have sprung?

(2). Whether allegedly inconsistent extra-judicial statements made by the petitioner concerning the source of his assets might properly be treated as proof that such assets were derived from a current taxable source for purposes of satisfying the "likely source" requirement and making out a prima facie case?

(3). Whether the requirements with respect to due process of law, use of circumstantial evidence, and trial by jury were satisfied where petitioner's conviction was upheld on a theory completely different from that on which he was prosecuted and on which the trial judge charged the jury, the majority of the Court of Appeals saying that such charge was "too favorable" to the defendant?

(4). Whether evidence which was introduced to permit the jury to infer that petitioner was a grafting policeman, but which was concededly insufficient for that purpose, was nevertheless non-prejudicial, assuming that the jury might have convicted the petitioner without such evidence?

(5). Whether the safeguards and criteria laid down by this Court in Holland v. United States, 348 U.S. 121 and companion cases for use in net worth prosecutions were properly observed, particularly with respect to burden of proof, net worth starting point, and corroboration?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment provides, in pertinent part:

> "No person shall be * * * deprived of life, liberty, or property, without due process of law * * *."

The Sixth Amendment provides, in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed * * *."

Section 145 (b) of the Internal Revenue Code of 1939 provides:

> "Failure to collect and pay over tax, or attempt to defeat or evade tax. Any person required under this chapter to collect, account for, and pay over any tax imposed by this Chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution. (26 U.S.C. 1946 ed., Sec. 145 (b)).

STATEMENT OF THE CASE

The petitioner was indicted on five counts charging income tax evasion for the years 1947 through 1951. The government, at the trial, relied on the so-called "net worth" theory of proof. Petitioner was convicted on the counts for the years 1948, 1949 and 1950 and was acquitted on the count for 1951. The jury was unable to agree on the count for the first year, 1947.

Petitioner was employed as a policeman in Rochester, New York during the indictment years, and was assigned to special duty investigating vice at various times during some of those years. There was no evidence, however, that he was engaged in vice investigation at any time during the year 1950 (Opinion, App. 2).[1]

In constructing its net worth chart (Ex. 80, Opinion, App. 18), the government gave petitioner no credit for cash on hand at the beginning of any indictment year. Treating the petitioner and his family as an economic unit, it imputed to his earnings the assets and expenditures of his wife and children (Opinion, App. 3; R. 1290). In this manner, it calculated unreported income for the conviction years (1948, 1949, 1950) in the amounts of $7,892.20, $2,976.17 and $1,103.22, respectively (Ex. 80; Opinion, App. 3, 18). The claimed tax evasion for those years was $1,900.04 for 1948, $646.64 for 1949, and $378.32 for 1950 -- a total of $2,925.00. (Ex. 82; R. 973). The application of the net worth method to the year 1951 indicated an overpayment of tax (Ex. 80, Opinion App. 3).

As stated in the majority opinion below, "It was the Government's theory that the unreported taxable income as indicated by its net worth chart was graft received by the defendant for non-performance of his duties as a policeman and as a member of the vice squad." (App. 4). There was no evidence that the petitioner ever received a bribe, but the government relied upon so-called "opportunities"

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1. This refers to the opinion of the Court of Appeals, reproduced in the appendix to this petition; page references are to the pages of the appendix.

flowing from his position. (Opinion, App. 4). In this connection, it introduced evidence of extensive gambling activity in Rochester during the spring and early summer of 1948 when petitioner was on the vice squad; evidence that he had been told of the sale of policy slips in 1948 but that no action was taken until two other officers made an arrest; statistics of gambling cases in Rochester City Court; and evidence that petitioner was on "friendly terms" with a professional gambler. (Opinion, App. 4, 20).

Although petitioner did not testify at the trial, he made a number of extra-judicial statements to investigators concerning his assets and expenditures. The Court below stated that there was evidence that these were "inconsistent, false and misleading." (Opinion, App. 9).

The Court of Appeals affirmed the petitioner's conviction by a 2 to 1 vote. Judge Hincks wrote the majority opinion. Judge Frank forcefully dissented on several major issues.

In affirming, the majority of the Court of Appeals held that proof of a "likely source" of income was not necessary to sustain the conviction in this case. (Opinion, App. 13). Although the trial judge, in line with the theory of the prosecution, had instructed the jury that, to convict, it must find that the petitioner actually received graft. (R. 1296), the majority of the Court below held that in this respect "the charge was too favorable to the defendant." (Opinion, App. 13 f. n. 12).

The petitioner is presently free on bail. The mandate of the Court of Appeals has been stayed pending disposition of this petition.

REASONS FOR GRANTING THE WRIT

I.

IN AFFIRMING THE DEFENDANT'S CONVICTION ON THE NET WORTH THEORY WITHOUT PROOF OF A LIKELY SOURCE OF INCOME, THE DECISION OF THE COURT OF APPEALS IS IN ERROR, AND CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT AND OF OTHER COURTS OF APPEALS.

A. The decision below conflicts with this Court's opinion in the Holland case, and with decisions of the First and Sixth Circuits.

In Holland v. United States, 348 U. S. 121 (1954), this Court said:

> "Increases in net worth, standing alone, cannot be assumed to be attributable to currently taxable income. But proof of a likely source, from which the jury could reasonably find that the net worth increases sprang is sufficient." 348 U. S. 121, 137, 138.

On the same day that the Holland case was decided, this Court also decided three other "net worth" cases: Friedberg v. United States, 348 U.S. 142 (1954); Smith v. United States, 348 U. S. 147 (1954); and United States v. Calderon, 348 U. S. 160 (1954). In its opinion in Holland this Court said:

> "In each of the four cases decided today, the allegedly unreported income comes from the same disclosed sources as produced the taxpayer's reported income * * * " 348 U.S. 121, 126.

On April 12, 1956, the Court of Appeals for the First Circuit, in Constantine Thomas v. Commissioner, 232 F. 2d 520, reversed the Tax Court in a civil net worth fraud case because, among other things the government had failed to show a likely source of income. Citing and relying upon this Court's decision in the Holland case, supra, the Court of Appeals said (at p. 526):

> "Respondent contends that this rule [requiring proof of a likely source] has no application in cases involving the civil fraud penalty or routine cases of deficiency. We do not agree. We think it is of equal importance in a civil case to show that the taxpayer's net worth increases are attributable to currently taxable income. It seems to us more reasonable to view this particular requirement as an indispensable element of the net worth method in any of its applications rather than as an additional safeguard superimposed upon the net worth method for the sole benefit of defendants in criminal cases -- particularly in view